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ABSTRACT

This brief paper summarizes a full length report of the same title which examines the ongoing debate on the conflicting rights and responsibilities of students and college administrations in the areas of offensive speech, rights of assembly, drug testing and campus safety. On offensive speech and the rights of colleges and universities to regulate it, the courts have ruled against higher education institutions' prohibiting offensive or hate speech because institutional policies have failed to distinguish sanctionable speech from protected speech. Considerations concerning students' rights of association and assembly on campus include the following: that institutions should not deny groups recognition because the college or university does not agree with their views; that student groups should be treated the same as other groups provided they fulfill the same procedural and substantive requirements established by the institution; that colleges are within their rights to emphasize that acknowledgement of student groups does not indicate institutional approval of the group's views; and that student demonstrations on public college campuses cannot be prohibited on the basis of content or message. On the status of mandatory drug testing for athletes, the courts in several jurisdictions have been unwilling to accept colleges' and universities' stated purposes for drug testing. With regard to institutional responsibility for student safety, the element of foreseeability has become a criterion in many states for determining college and university liability. (Contains five references.) (JB)

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Annette Gibbs

Reconciling the rights and responsibilities of colleges and universities with those of their students during recent years has been problematic for numerous higher education administrators as they have sought to resolve conflicts between students and institutions. Students have charged that administrative policies and practice have directly conflicted with their constitutional rights, and administrators have responded that their responsibilities as institutional officials require them to consider the priorities of their colleges and universities in designing and implementing policy.

What Rights Do Colleges and Universities Have Relative to Regulating Offensive Speech on Campus?

Because offensive speech is defined by its content, regulations at public colleges and universities to prohibit it raise important questions of boundaries and interpretations of the First Amendment. To date, the courts have ruled against higher education institutions' prohibiting offensive, or hate, speech because the policies failed to distinguish sanctionable speech from protected speech. In reconciling the rights of students and the responsibilities of the public institution, administrators should consider:

- Speech or expression may not be punished on the basis of the subjects the speech addresses. The government must be neutral when it regulates speech.
- Overbroad policies regulating speech have been ruled unconstitutional.
- Unduly vague policies regulating speech have been ruled unconstitutional.
- Restrictions on time, place, and manner of speech or expression appropriate for the educational environment and for maintaining order on the campus are constitutional.
- Policies based on "fighting words," even in part, cannot discriminate on the basis of content or point of view.
- Protections and procedures regarding due process should be in place before and followed during any disciplinary process.

What Issues Surround Students' Rights of Association and Assembly on Campus?

Greek social groups, gay student groups, and student religious groups continue to charge college and university administrators with denying their rights and privileges of recognition that other, less controversial groups receive. Still other students assemble on an ad hoc basis, often issue by issue, and campus demonstrations appear to have moved from protests about apartheid in South Africa to issues like abortion and AIDS. Several policy considerations seem appropriate:

- Once some student groups have been recognized, or registered, by their institution, other groups should not be denied such treatment simply because the college or university does not agree with their views.
- Student groups should be treated the same as other groups have been treated, provided they fulfill the same procedural and substantive requirements established by the institution.
- Colleges and universities are within their rights to emphasize, even through public statements, that their acknowledgment of the existence of student groups does not indicate institutional approval of the groups' or organizations' religious, political, economic, or philosophical positions.
- Student demonstrations on public college campuses, like other associational activities, cannot be prohibited on the basis of content or the message to be communicated.
- Greek groups that are primarily social in nature and also part of a national organization may be treated, as a whole, differently from other student groups in terms of institutional recognition and requirements for affiliation.
- Whatever an institution's relationship with its Greek groups, that relationship should be conveyed to all applicable groups and their respective national organizations before institutional recognition or affiliation.

What Is the Status of Mandatory Drug Testing for Athletes?

Courts in several jurisdictions have been unwilling to accept colleges' and universities' stated purposes for drug testing. Likewise, the NCAA has failed to convince most courts that it, on behalf of its member institutions, has a compelling need to test athletes randomly. While some issues surrounding testing remain debatable, the courts appear to be developing consensus about the questions and principles they will address.

- Whether an institution chooses to go along with the NCAA's testing procedures or to conduct its own testing program, it should develop clear and

definitive policy objectives for its testing requirements and match those objectives to achieve the desired and stated outcome.
- The accuracy of tests is limited, and procedural safeguards should be incorporated in drug testing programs to allow students who test positive to respond to or rebut the findings. Such students could be allowed access to an additional, independent laboratory analysis.
- The courts' most recent rulings appear to support the position that institutional *mandatory* drug testing programs violate the principle of protection of privacy guaranteed in most state constitutions.
- Strong consensus is evident among the courts that colleges and universities need to have drug education programs emphasizing prevention and rehabilitation, not only for athletes but for all students.

Finally, because an institution, if it participates in the NCAA's testing program, is the enforcer of any NCAA legislation against students, it could be subject to state laws and regulations relative to such enforcement and thus find itself between its students and the NCAA in legal claims brought by students.

What Responsibilities Do Colleges and Universities Have for Students' Safety on Campus?

In situations involving the victimization of students as well as other personal injuries to students on campus, the element of foreseeability has become a criterion in many states for determining colleges' and universities' liability. The extent to which an institution knew, or should have known, that a student was exposed, or could be exposed, to a risk of injury has become a major factor in courts' determining whether the institution owed a duty of care to the student. The courts have ruled further that:
- Institutions generally are on notice of the potential for criminal harm if similar criminal incidents have occurred in the past; harm is thus foreseeable.
- Colleges and universities should show that they exercise reasonable care to keep their campus free from conditions that create or increase the risk of harm.
- If the college or university assumes a landowner/business invitee relationship with its students, it may be held to similar duties of private landlords in the maintenance of physical security on the premises.
- When higher education institutions have shown that their relationships with students are not sufficiently special (landlord/tenant, for example), courts have been hesitant to impose upon them a duty to protect students from harm.
- When the college or university could not foresee harm to a student, courts have been reluctant to impose liability on the institution for the harm.

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